85-2030

No. _____

Supreme Court, U.S.
FILED
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CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

SAUNDRA J. ROLAND AND RONNIE J. ROLAND,
Petitioners,

v.

PAUL H. KLINGENBERG, M.D.

## PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

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## QUESTIONS PRESENTED

1. Whether a medical malpractice Statute of Limitations or "repose" which extinguishes a cause of action which has not yet accrued through discovery, is unconstitutional as violative of the Equal Protection clause of the 14th Amendment to the United States Constitution.

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING PETITION | 5 |
| CONCLUSION | 10 |
| APPENDIX A<br>Order Denying Motion For Discretionary Review | 1a |
| APPENDIX B<br>Affirming Opinion of the Kentucky Court of Appeals | 2a-5a |
| APPENDIX C<br>Order of Kenton Circuit Court Dismissing Complaint | 6a-7a |
| APPENDIX D<br>Excerpt from Memorandum Opposing Motion To Dismiss | 8a-10a |
| APPENDIX E<br>Excerpt from Petitioners' Appellate Brief | 11a-13a |
| APPENDIX F<br>Excerpt from Petitioners' Motion For Discretionary Review | 14a-15a |

# TABLE OF AUTHORITIES


Page

**Cases:**

*Austin* v. *Litvak*, 682 P. 2d 41 ..... 7

*Dauggard* v. *Baltic Co-Op Building Ass.*, 349 N.W. 2d 419 ..... 8

*General Electric Company, et al.* v. *Nucor Corp., et al.*, Case #85-SC-63 TRG (Ky. Sup. Ct. 11-21-85) ..... 8

*Heath* v. *Sears, Roebuck & Co.*, 464 A. 2d 288 .... 7

*Kennedy* v. *Cumberland Eng., Company, Inc.*, 471 A. 2d 195 ..... 7-8

*Kenyon* v. *Hammer*, 688 P. 2d 961 ..... 6

*Langford* v. *Sullivan, Long & Haggerty*, 416 So. 2d 996 ..... 8

*McLaughlin* v. *Florida*, 379 U.S. 184 ..... 9

*Nelson* v. *Kursen*, 678 S.W. 2d 918 ..... 7

*Norwell* v. *Illinois*, 373 U.S. 420 ..... 9

*Saylor* v. *Hall*, 497 S.W. 2d 218 ..... 8

*Tabler, et al.* v. *Wallace*, Case #84-SC-844-DG (Ky. Sup. Ct. 11-21-85) ..... 8, 9

*Yick Wo* v. *Hopkins*, 118 U.S. 356 ..... 9

Page

**Constitution, Statutes and Regulations:**

United States Constitution, 14th Amendment ..... 2

Kentucky Revised Statutes

KRS 413.140(1)(e) ..... 2, 4

KRS 413.140(2) ..... 2-3, 4, 5

**Miscellaneous:**

Prosser, *Handbook of the Law of Torts* ..... 8

IN THE

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SAUNDRA J. ROLAND AND RONNIE J. ROLAND,
Petitioners,

v.

PAUL H. KLINGENBERG, M.D.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

---

A writ of certiorari is respectfully sought to review the Kentucky Supreme Court's Order denying Petitioner's Motion For Discretionary Review. The Petition is filed on behalf of Saundra and Ronnie Roland whose medical malpractice claim was effectively foreclosed before discovery of the negligence by operation of KRS 413.140 (2), the constitutionality of which is the subject matter of this Petition.

## OPINIONS BELOW

There was no formal opinion of the Kentucky Supreme Court. The Order Denying Motion For Discretionary Review is reproduced in Appendix A to this Petition.

The Opinion of the Kentucky Court of Appeals affirming the Kenton Circuit Court's grant of Summary Judgment will not be reported. It is reproduced in Appendix B to this Petition.

The Order of the Kenton Circuit Court dismissing the Complaint of the Plaintiffs is reproduced in Appendix C.

## JURSIDICTION

The Order of the Kentucky Supreme Court denying Petitioner's Motion For Discretionary Review (Appendix A, infra) was entered on March 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The 14th Amendment to the United States Constitution provides in relevant part:

> . . . nor deny to any person within its jurisdiction the equal protection of the law.

2. Kentucky Revised Statutes, KRS 413.140(1)(e) provides:

> (1) The following actions shall be commenced within one (1) year after the cause of action accrued:
> (e) An action against a physician, surgeon, dentist or hospital licensed pursuant to KRS Chapter 216, for negligence or malpractice.

3. Kentucky Revised Statutes, KRS 413.140(2) provides:

(2) In respect to the action referred to in paragraph (e) of subsection (1) of this section, the cause of action shall be deemed to accrue at the time the injury is first discovered or in the exercise of reasonable care should have been discovered; provided that such action shall be commenced within five (5) years from the date on which the alleged negligent act or omission is said to have occurred.

## STATEMENT OF THE CASE

This case originated upon the filing of a Complaint by the Petitioner, on July 12, 1983, in the Kenton, Kentucky Circuit Court. Petitioners alleged that in October, 1971, Defendant-Respondent, Paul H. Klingenberg, M.D., committed medical malpractice while treating Petitioner, Saundra J. Roland.

Specifically, Petitioners alleged that Respondent Klingenberg performed abdominal surgery on the Petitioner, Mrs. Roland, in October of 1971 as a result of a gall bladder condition. Subsequent to this surgery, the Respondent informed the Petitioners that the entire gall bladder had been removed, but, in fact, only a portion of it had been removed. As a result of the Respondent's failure to remove the entire gall bladder, the Petitioner suffered severe, disabling pain, which forced Mrs. Roland to undergo additional surgery on March 28, 1983. On that date, Saundra Roland's entire gall bladder was removed by a different surgeon.

Petitioners alleged further in their Complaint that the Respondent falsely represented the true nature of the Petitioner's condition, and fraudulently concealed this condition from her and her family members. Also, Peti-

tioners alleged that the negligence of the Respondent was not discovered until March of 1983.

After the filing of Respondent's Answer to the Complaint, discovery by way of Interrogatories and Requests For Production Of Documents was engaged in. Following the various discovery efforts, on May 8, 1984, Respondent Klingenberg filed a Motion To Dismiss. The only authority cited in support of that Motion was KRS § 413.140(1)(e) and KRS § 413.140(2). On May 10, 1984, Petitioners filed a Memorandum opposing the Motion To Dismiss. Petitioners raised for the first time that a Statute of Limitation or "repose" which abolishes common law rights of action before the Plaintiff has even discovered the cause of action is of doubtful constitutionality. (See Appendix D, pages 8a-9a).

On July 12, 1984, the Trial Court entered an Order dismissing the Complaint, stating that the Complaint was barred by the Statute of Limitations. (See Appendix C, pages 6a-7a). Petitioners filed a Notice of Appeal from such Order on August 8, 1984, and on September 25, 1984, the Kenton, Kentucky, Circuit Court Clerk filed and served Notice Of Certification of the Record On Appeal. The Petitioners' Appellate Brief, filed October 24, 1984, again raised the issue of the constitutionality of KRS § 413.140(2). (See pertinent parts of Petitioners' Appellate Brief at Appendix E, pages 12a-13a). The Appellate Court for the Commonwealth of Kentucky affirmed the lower Court's decision without ruling on the question of the constitutionality of the Statute of Limitations which barred Petitioner's cause of action. (See Appendix B, pages 2a-5a).

On January 22, 1986, Petitioners filed a Motion For Discretionary Review with the Supreme Court of Kentucky. Petitioners realleged in this Motion that KRS

§ 413.140(2) is unconstitutional in violation of various provisions of the Kentucky Constitution and also because it cuts off causes of action for medical malpractice before they have accrued. (See pertinent parts of Petitioner's Motion For Discretionary Review at Appendix F, pages 14a-15a). The Motion For Discretionary Review was denied by the Supreme Court; such Order being entered on March 12, 1986. (See Appendix A, page 1a). The Court gave no explanation for its action. Petitioners' constitutional claims were thus made at the earliest opportunity and were renewed at each stage of the proceedings below.

## REASONS FOR GRANTING THE PETITION

The Decision of the Kentucky Supreme Court entered March 12, 1986, which Petitioners seek to review, encourages and rewards fraudulent as well as negligent conduct. By failing to reach the issue of the constitutionality of KRS § 413.140(2), the Courts below have permitted the physicians, who can conceal malpractice from a patient for five years, or whose victims cannot discover this malpractice within the five year period, to escape legal responsibility for their damaging conduct.

Kentucky's "final repose" statute involved herein places an absolute limitation that actions against physicians "shall be commenced within five (5) years from the date on which the alleged negligent act or omission is said to have occurred". This type of "repose" legislation does not, however, function as a Statute of Limitations, but rather to cut off claims which have not accrued within that period. The contents of the statute refer to a narrowly defined and exclusively protected class, that is, physicians. The contents of the statute also refer to a narrowly defined and exclusively protected class, which

involves victims of medical malpractice which have the opportunity to discover the negligence of their medical practitioners within the five year period. The nature of the statute, as it relates to individual patients, such as Petitioner Saundra Roland, reinforces the perception that it was enacted in response to a lobbying effort rather than because of reasonable, natural and justifiable distinctions between the protected groups and others.

As it is presently, Kentucky physicians are encouraged to violate the position of trust which they occupy in the confidential physician/patient relationship, in order to place their actions outside the five year period and within the area of immunity from legal responsibility. The innocent patient who has relied in good faith upon the physician is penalized for a misplaced trust.

The ultimate inequity created by a Statute of Limitations or "repose" would occur if Respondent Klingenberg and other physicians similarly situated are permitted to hide behind a procedural shield forged from their own misdeeds. The Order of the Kentucky Supreme Court, denying discretionary review of the Kentucky Court of Appeals, sets a dangerous precedent in reaching this unjust result.

Several State Supreme Courts have considered the constitutionality of "Statutes of Repose" in the area of medical malpractice as well as the areas of products liability and "builders and architects" suits. In *Kenyon* v. *Hammer*, 688 P. 2d 961 (Ariz. 1984), the Arizona Supreme Court held an Arizona statute unconstitutional which purported to bar a medical malpractice victim's claim before she knew it existed. The Court held it impermissible to provide economic relief to one segment of society (in the form of lower insurance premiums) by

passing a Statute of Repose which deprives some of those who have been wronged of access to, and remedy by, the state's judicial system. The Court's reationale focused on the premise that if such a practice was approved, any business, profession, or industry experiencing difficulty could be made the beneficiary of special legislation designed to ameliorate its economic adversity by limiting access to the Courts.

The Supreme Court of Texas in *Nelson* v. *Kursen*, 678 S.W. 2d 918 (Tex. 1984), found a two-year Statute of Repose in medical malpractice actions to be unconstitutional. In so holding, the Court stated that "the limitation period of . . . [the Statute of Repose], if applied as written, would require the . . . [plaintiffs] to do the impossible — to sue before they had any reason to know they should sue. Such a result is rightly described as 'shocking' and is so absurd and so unjust that ought not to be possible."

In *Austin* v. *Litvak*, 682 P. 2d 41 (Colo. 1984), the Colorado Supreme Court declared a medical Statute of Repose unconstitutional as being violative of the state's equal protection clause. The Court ruled that the Colorado Statute of Repose was arbitrary, unreasonable, and had no rational basis because it unfairly discriminated against certain classes of patients who could not learn of their cause of action within the period of the repose provision.

In *Heath* v. *Sears, Roebuck & Co.*, 464 A. 2d 288 (N.H. 1983), the New Hampshire Supreme Court declared a twelve year Statute of Repose unconstitutional which attempted to bar all products liability claims filed after twelve years. The Rhode Island ten year products liability Statute of Repose was likewise struck down in *Kennedy* v. *Cumberland Engineering*

*Co., Inc.*, 471 A. 2d 195 (R.I. 1984). The Court held that "the total denial of access to the Courts for adjudication of a claim even before it arises, most certainly flies in the face of the constitutional command found in Art. 1, § 5." The Rhode Island Court, citing Prosser, *Handbook of the Law of Torts*, § 30 at 144 (4th Ed. 1971), found that "to require a man to seek a remedy before he knows of his rights, is palpably unjust."

The South Dakota Supreme Court in *Dauggard* v. *Baltic Co-Op Building Association*, 349 N.W.2d 419 (S.D. 1984), found a six year Statute of Repose relating to the design and construction of buildings to be unconstitutional. The Alabama Supreme Court also found its ten year products liability Statute of Repose unconstitutional in *Langford* v. *Sullivan, Long & Haggerty*, 416 So. 2d 996 (Ala. 1982). The Court noted that the injured plaintiff could not be denied access to the Courts before he had any reason to know of his injuries. Similarly, the Kentucky Supreme Court held in *Saylor* v. *Hall*, 497 S.W. 2d 218 (Ky. 1973), that a Statute of Repose which purported to bar a cause of action before it accrued was unconstitutional.

Finally, on November 21, 1985, the Kentucky Supreme Court declared unconstitutional a very similar statute, namely, KRS 413.135, the architects/builders' "no action" statute. That statute provided immunity from suit for damages or injury caused by any deficiency after the expiration of five years following substantial completion of the improvement. *Tabler, et al.* v. *Wallace*, Case #84-SC-844-DG; and *General Electric Company, et al.* v. *Nucor Corp., et al.*, Case #85-SC-63-TRG (1985).

The Court held that the architects/builders' "no action" statute was unconstitutional under § 59(5) of the

Kentucky Constitution. That section prohibits the General Assembly from passing any special acts which limit civil actions. *Tabler*, *supra* at 8. The Court found that the only apparent basis for KRS 413.135 was to favor a special class that had lobbied for the statute. *Tabler*, *supra* at 18.

The same rationale applies in the present case. The general public is exposed to injury without compensation. While at the same time, a special class of physicians is granted immunity.

The trend in this country is clear; Statutes of Repose which effectively cut off a Plaintiff's cause of action before the injury is even discovered is patently unfair and clearly unconstitutional. The guarantee of equal protection of the law is a pledge of the protection of equal laws. Although exact equality is not a prerequisite of equal protection, classifications which are invidiously discriminatory are forbidden. (See *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 S. Ct. 1064, 1070, 30 L. Ed 220 (1886). Invidious discrimination is defined as a classification which is arbitrary, irrational and unrelated to a legitimate state purpose. *Norwell* v. *Illinois*, 373 U.S. 420, 423, 83 S. Ct. 1366, 1368, 10 L. Ed. 2d 456 (1963). Equal protection requires that the classification rest on real and not feigned differences; the distinctions have some relevance to the purpose for which the classification is made, and the different treatments are not so disparate relative to the difference in classification as to be completely arbitrary. *McLaughlin* v. *Florida*, 379 U.S. 184, 1981, 85 S. Ct. 283, 288, 13 L. Ed. 2d 222 (1964).

Because of the recent trend among the states regarding the unconstitutionality of "Statutes of Repose," as well as the injustice this particular statute causes among

victims of medical malpractice who are unfortunate in not discovering their injuries sooner, certiorari should be granted so that the Supreme Court can examine this problem more closely, and provide guidance to the remaining states who will no doubt be confronted with this question in the very near future.

## CONCLUSION

For all of the foregoing reasons, the Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

SUPREME COURT OF KENTUCKY

86-SC-60-D
(84-CA-2325-MR)

KENTON CIRCUIT COURT
#83—CI-1004

SANDRA J. ROLAND and RONNIE J. ROLAND
MOVANTS

v.

PAUL H. KLINGENBERG, M.D.
RESPONDENT

**ORDER DENYING MOTION FOR DISCRETIONARY REVIEW**

The motion for review of the decision of the Court of Appeals is denied.

The opinion of the Court of Appeals is hereby ordered not to be published.

White, J., not sitting.

ENTERED March 12, 1986.

/s/ ROBERT F. STEPHENS
Chief Justice

## APPENDIX B

OPINION RENDERED: October 18, 1985; 10:00 a.m.
TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 84-CA-2325-MR

SAUNDRA J. ROLAND and RONNIE J. ROLAND
APPELLANTS

v.

PAUL H. KLINGENBERG, M.D.
APPELLEE

**APPEAL FROM KENTON CIRCUIT COURT**
**HONORABLE DOUGLAS STEPHENS, JUDGE**
**CIVIL ACTION NO. 83-CI-1044**

**AFFIRMING**

BEFORE: COOPER, HOWERTON AND LESTER, JUDGES.

COOPER, JUDGE. This is an appeal from a summary judgment for the appellee, defendant below, in an action for medical malpractice. On appeal, the single issue is whether the trial court acted correctly in ruling that there was no genuine issue as to any material fact, and the appellee was entitled to judgment as a matter of law. CR 56.03. KRS 413.140. Reviewing the record below, we affirm.

The essential facts of this action are as follows: In July of 1983, the appellants, Saundra J. Roland and Ronnie J. Roland, filed an action in negligence against the appellee, Paul H. Klingenberg, M.D. Specifically, they alleged that the appellee performed abdominal surgery on the appellant, Saundra J. Roland, in October of 1971 as a result of a gall bladder condition. Subsequent to this surgery, the appellee informed the appellants that the entire gall bladder had been removed; but, in fact, only a portion of it had been removed. As a result of the appellee's failure to remove the entire gall bladder, the appellant suffered severe, disabling pain, thus forcing her to undergo additional abdominal surgery in March of 1983 for the removal of her entire gall bladder.

The appellants alleged that the appellee falsely represented the true nature of the appellant's condition, and fraudulently concealed this condition from her and her family members. Furthermore, they alleged that the negligence of the appellee was not discovered until March of 1983.

Subsequent to discovery by both parties, the appellee filed a motion to dismiss the action on the basis of KRS 413.140(1) (e), as well as KRS 413.140(2). Specifically, he alleged that the action was barred by the statute of limitations and by the five-year limit with respect to medical malpractice actions set forth in KRS 413.140(2). After briefing by both parties, the trial court subsequently entered an order dismissing the action, ruling that the complaint was barred by the statute of limitations. It is from such order that the appellants now appeal.

Under the language of CR 56.03, a trial court can grant summary judgment only if it is established that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.

In ruling on such motion, it must view the record in a light most favorable to the party opposing the motion. *See Dossett* v. *New York Mining and Mfg. Co.*, Ky., 451 S.W.2d 843 (1970). Furthermore, a summary judgment proceeding must be utilized with extreme caution and is not a substitute for a trial. *Shelanie* v. *National Fireworks Assn.*, Ky., 487 S.W.2d 921 (1972). Nevertheless, such a proceeding is warranted if the facts and the law support it. Here, the appellants not only alleged negligence on the appellee's part, but misrepresentation and fraudulent concealment as well.

Yet, under the language of KRS 413.140(2), a five-year limitation period was created for a medical malpractice action regardless of when the plaintiff discovers the negligence. Here, the alleged negligence occurred in 1971. In 1971, the limitation period for a medical malpractice action was one year; nevertheless, case law in 1971 held that the statute of limitations was tolled until the claimant knew, or should have known, of the negligence. *Tomlinson* v. *Siehl*, Ky., 459 S.W.2d 166 (1970).

With the 1974 enactment of KRS 143.140(2), although acknowledging *stare decisis*, the legislature created a five-year limit on the time allowed for discovering negligence and for filing a claim. Thus, under the statute, the appellants' claim ran out at least by 1979, five years from the enactment of KRS 143.140(2).

Finally, although the appellants *alleged* fraud and misrepresentation on the part of the appellee, there was no allegation that the appellee acted in such a way so as to induce the appellants to inaction. *Cf. Hackworth* v. *Hart*, Ky., 474 S.W.2d 377 (1971); *Adams* v. *Ison*, Ky., 249 S.W.2d 791 (1952). And, in light of the fact the complaint alleges that the appellant experienced "severe

abdominal pains" following the surgery of October 1971, it is arguable that she was put on notice of any negligence at that time, requiring her to file an action within the following year.

The judgment of the trial court is affirmed.

ALL CONCUR.

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## APPENDIX C

COMMONWEALTH OF KENTUCKY
SIXTEENTH JUDICIAL CIRCUIT
KENTON CIRCUIT COURT
SECOND DIVISION

NO. 83-CI-1044

SAUNDRA J. ROLAND and RONNIE J. ROLAND
PLAINTIFFS

VS.

PAUL H. KLINGENGERG, M.D.
DEFENDANT

### ORDER
(Filed July 12, 1984)

The Defendant, Paul H. Klingenberg, M.D., has filed a motion to dismiss Plaintiffs' complaint for the reason that it is barred by the statute of limitations. Said motion shall be treated as a motion for summary judgment. This matter has been fully briefed and argued before the Court, and the Court being fully and sufficiently advised enters the following order.

IT IS HEREBY ORDERED AND ADJUDGED that the complaint of the Plaintiffs, Saundra J. Roland and Ronnie J. Roland, against the Defendant, Paul H. Klingenberg, M.D., is DISMISSED as it is barred by the statute of limitations.

SO ORDERED this the 12th day of July, 1984.

/s/ DOUGLAS M. STEHPENS,
JUDGE
KENTON CIRCUIT COURT
SECOND DIVISION

Copies to:

Hon. Thomas R. Yocum
Hon. Frank V. Benton, III

## APPENDIX D

## EXCERPT FROM MEMORANDUM OPPOSING MOTION TO DISMISS

* * *

At the time that statute of limitations became effective, Plaintiff Saundra Roland had an existing right and cause of action under the discovery rule. Her right and cause of action could not be cut short by the subsequent enactment of KRS 413.140.

"No statute shall be construed to be retroactive, unless expressly so declared." KRS 446.080(3). No express declaration is contained in the statute of limitations cited by Defendant which would make the statute of limitations retroactive. Accordingly, the application of KRS 413.140 must be prospective, and cannot be applied to Plaintiff Saundra Roland.

The law disfavors statutes which attempt to cut-off or abolish common law rights of actions before the cause of action reaches fruition. See *Saylor* v. *Hall*, 497 S.W.2d 218 (Ky. 1973). The Kentucky Constitution at Section 14 provides:

> All Courts shall be open and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

In *Saylor* v. *Hall*, the Kentucky Court of Appeals applied Section 14 of the Kentucky Constitution to declare unconstitutional a statute of limitations very similar to the statute of limitations upon which Defendant relies herein. Consequently, the very constitutionality of a

statute of limitation which abolishes a cause of action, before the Plaintiff has even discovered the cause of action is of doubtful constitutionality. However, it is not necessary for this Court to rule on the constitutional issue, because of the numerous other reasons set forth above.

The Supreme Court of Florida had occasion to rule on the application of a medical malpractice statute of limitations in a situation almost identical to that presently before this Court, in *Dade County* v. *Ferro*, 384 So.2d 1283 (1980). A copy of that case is attached for the Court's convenience. Florida adopted a statute of limitations for medical malpractice actions which was very similar to Kentucky's. The statute incorporated the discovery principle, but placed an absolute limitation that, "In no event shall the action be commenced later than four years from the date of the incident or occurrence out of which the cause of action accrued." F.S. 95.11(4)(b). In the *Dade County* case, the alleged malpractice occurred on or about May 1971. The Plaintiff discovered the alleged malpractice in September, 1975 and filed a medical malpractice claim on April 27, 1977, more than four years after the allegedly negligent treatment. The new statute of limitations in Florida which abolished the unlimited and open ended discovery rule became effective on May 20, 1975. In the *Dade County* case, the Court held:

> Accordingly, we hold that Section 95.11(4)(b), Florida Statutes (1975), evinces no express, clear or manifest intent that it be applied retroactively and, therefore, the four year limitation period contained therein may not be applied to a medical malpractice claim where the occurrence or incident out of which the claim arose predates the effective date of the statute.

*Dade County* v. *Ferro*, 384 S.O.2d at 1287. The Court recognized that due to the fact that the negligent conduct had occurred prior to the effective date of the statute, the Plaintiff possessed certain rights which had vested, even though the cause of action had not accrued in a technical sense.

Likewise, in the case presently before this Court, Plaintiff Saundra Roland acquired certain vested rights at the time Defendant Klingenberg negligently performed surgery upon her in 1971. Those rights could not be terminated, prior to her discovery of the negligent conduct, by the subsequent enactment of a new statute of limitations.

> The Legislature's power to enact statutes of limitation governing the time in which a cause of action must be asserted by suit is, of course, unquestioned. In this state, however, it is equally well settled that the legislator may not abolish an existing common law right of action for personal injuries or wrongful death caused by * * *

* * *

## APPENDIX E

## EXCERPT FROM PETITIONERS' APPELLATE BRIEF

* * *

The law disfavors statutes which attempt to cut-off or abolish common law rights of action before the cause of action reaches fruition. See *Saylor* v. *Hall*, Ky., 497 S.W.2d 218 (1973). The Kentucky Constitution at Section 14 provides:

> All Courts shall be open and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

In *Saylor* v. *Hall*, the Kentucky Court of Appeals applied Section 14 of the Kentucky Constitution to declare unconstitutional a statute of limitations very similar to the statute of limitations upon which Defendant relies herein. Consequently, a statute of limitations which abolishes a cause of action, before the Plaintiff has even discovered the cause of action is doubtful constitutionality. However, it is not necessary for this Court to rule on the constitutional issue, because of the numerous other reasons set forth above.

The Supreme Court of Florida had occasion to rule on the application of a medical malpractice statute of limitations in a situation almost identical to that presently before this Court, in *Dade County* v. *Ferro*, Fla., 384 So.2d 1283 (1980). Florida adopted a statute of limitations for medical malpractice actions very similar to Kentucky's "final repose" statute. The statute incor-

porated the discovery principle, but placed an absolute limitation that, "In no event shall the action be commenced later than four years from the date of the incident or occurrence out of which the cause of action accrued." F.S. 95.11(4)(b). In the *Dade County* case, the alleged malpractice occurred on or about May, 1971. The Plaintiff discovered the alleged malpractice in September, 1975 and filed a medical malpractice claim on April 27, 1977, more than four years after the allegedly negligent treatment. The new statute of limitations in Florida which abolished the unlimited and open ended discovery rule became effective on May 20, 1975. In the *Dade County* case, the Court held:

> Accordingly, we hold that Section 95.11(4)(b), Florida Statutes (1975), evinces no express, clear or manifest intent that it be applied retroactively and, therefore, the four year limitation period contained therein may not be applied to a medical malpractice claim where the occurrence or incident out of which the claim arose predates the effective date of the statute.

*Dade County* v. *Ferro*, 384 So.2d at 1287. The Court recognized that due to the fact that the negligent conduct had occurred prior to the effective date of the statute, the Plaintiff possessed certain rights which had vested, even though the cause of action had not accrued in a technical sense.

Likewise, in the case presently before this Court, Appellant Saundra Roland acquired certain vested rights at the time Appellee Klingenberg negligently performed surgery upon her in 1971. Those rights could not be terminated, prior to her discovery of the negligent conduct, by the subsequent enactment of a new statute of limitations.

> The Legislature's power to enact statutes of limitations governing the time in which a cause of action must be asserted by suit is, of course, unquestioned. In this state, however, it is equally well settled that the legislator may not abolish an existing common law right of action for personal injuries or wrongful death caused by negligence . . . in our view the application of these statutory expressions to the claims here asserted destroys, pro tanto, a common law right of actions for negligence that proximately causes personal injury or death, which existed at the times the statutes were enacted. The statutory expressions as they relate to actions based on negligence perform an abortion on the right of action, not in the first trimester, but before conception.

*Saylor* v. *Hall*, Ky., 497 S.W.2d 218 at 224 (1973).

* * *

# APPENDIX F

## EXCERPT FROM PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

### C. The Medical Malpractice Statute of Limitations, KRS 413.140(2), Is Unconstitutional, Particularly As Applied to Movants

The issue presented is whether a statute which extinguishes a cause of action which has not yet accrued through discovery is unconstitutional. On November 21, 1985, this Court declared unconstitutional a very similar statute, namely, KRS 413.135, the architects/builders' "no action" statute. That statute provided immunity from suit for damages or injury caused by any deficiency after the expiration of five years following substantial completion of the improvement. *Tabler, et al.* v. *Wallace*, Case #84-SC-844-DG; and *General Electric Company, et al.* v. *Nucor Corp., et al.*, Case #85-SC-63-TRG (1985).

This Court held that the architects/builders' "no action" statute was unconstitutional under § 59(5) of the Kentucky Constitution. That section prohibits the General Assembly from passing any special acts which limit civil actions. *Tabler, supra* at 8. The Court found that the only apparent basis for KRS 413.135 was to favor a special class that had lobbied for the statute. *Tabler, supra* at 18.

The same rationale applies in the present case. The general public is exposed to injury without compensation. While at the same time, a special class of physicians is granted immunity.

In both the Trial Court and the Court of Appeals,

Movants questioned the constitutionality of KRS 413.140 under § 14 of the Kentucky Constitution which provides:

> All courts shall be open and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

Movants further cited to the Trial Court and the Court of Appeals the Case of *Saylor* v. *Hall*, Ky., 497 S.W.2d 218 (1973) wherein the Kentucky Court of Appeals applied Sections 14, 54 and 241 of the Kentucky Constitution to declare unconstitutional KRS 413.135 as it applied in that case. These constitutional provisions restrict the legislative power to abolish or limit causes of action predating the Kentucky Constitution.

As this Court made clear in *Tabler* v. *Wallace*, *supra* at 12, the law disfavors statutes which attempt to cut off or abolish common law rights of action before the cause of action reaches fruition. KRS 413.140 is part of the "Topsy-Turvy Land," where causes of action are extinguished before they have occurred.

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Supreme Court, U.S.
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No. 85-2030

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1985

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SAUNDRA J. ROLAND and
RONNIE J. ROLAND - - - - Petitioners

versus

PAUL H. KLINGENBERG, M.D. - - - Respondent

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## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of the United States has jurisdiction to review a judgment of the Kentucky Supreme Court, where no federal question was presented in the court of first instance nor thereafter in the state appellate process.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Question Presented for Review | i |
| Table of Contents | ii |
| Table of Authorities | iii |
| Statement of the Case | 1 |
| Argument | 2–3 |
| Conclusion | 4 |

## TABLE OF AUTHORITIES


**Cases:** PAGE

*F. G. Oxley Stave Company, etc.* v. *County of Butler, et al.*, 166 U. S. 648, 41 L. Ed. 1149, 17 S. Ct. 709 (1897) ..... 3

*Webb* v. *Webb*, 451 U. S. 493, 68 L. Ed. 2d 392, 101 S. Ct. 1889 (1981) ..... 3

**Statute:**

28 U.S.C. sec. 1257(3) ..... 2

**Rule:**

U. S. Supreme Court Rule 21(h) ..... 2

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*v.*

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## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

Petitioners filed suit against respondent on July 12, 1983 in Kenton County (Ky.) Circuit Court alleging injuries from medical malpractice which occurred in October, 1971. The Circuit Court entered Summary Judgment dismissing the case because of the Statute of Limitations. Appeal was taken to the Kentucky Court of Appeals, which affirmed the decision of the Circuit Court. A motion for Discretionary Review was filed with the Supreme Court of Kentucky, which denied discretionary review.

At no stage of the proceedings was a federal question raised or mentioned, either in pleadings, briefs, arguments or in the decisions of any of the Courts.

## ARGUMENT

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. Sec. 1257(3). Respondent believes that no Federal question is presented and thus the Supreme Court of the United States does not have jurisdiction. Whether the Kentucky Statute in question violates the 14th amendment to the United States Constitution is first raised in the Petition for Writ of Certiorari to this Court.

The issue was not raised in the pleadings nor in the argument before the Kenton County, Kentucky, Circuit Court, which dismissed the claim under Kentucky's Statute of Limitations.

The issue was not raised nor considered before the Kentucky Court of Appeals which affirmed the decision of the Kenton Circuit Court. It was not raised in the Petition for Discretionary Review before the Kentucky Supreme Court which decided that it would not review the decision of the Kentucky Court of Appeals.

Petitioners have failed to comply with rule 21(h) of the Rules of the Supreme Court of the United States simply because petitioners are unable to specify any stage in the proceedings either in the Court of first instance or in the Appellate Court at which the Federal question sought to be reviewed by this Court, was raised.

It is a long-settled rule that the jurisdiction of the Supreme Court of the United States to re-examine the final judgment of a State Court can arise *only* if the

record as a whole shows either expressly or by clear implication that the Federal claim was adequately presented in the state system. *Webb* v. *Webb*, 451 U. S. 493, 68 L. Ed. 2d 392, 101 S. Ct. 1889 (1981).

Averments of a Federal question to give jurisdiction to the Supreme Court of the United States to review a state judgment must be so distinct and positive as to place it beyond question that the party bringing the case to the Supreme Court from the State Court intended to assert a Federal right. *F. G. Oxley Stave Company, etc.* v. *County of Butler, et al.*, 166 U. S. 648, 41 L. Ed. 1149, 17 S. Ct. 709 (1897).

In reviewing the appendices included in the petition herein, it is apparent that the 14th amendment to the U. S. Constitution or words which would import reliance thereon are not mentioned. Only references to Kentucky's constitution are included. Even then, petitioners state that it is not necessary for the Court to rule on the Kentucky Constitutional issue because of numerous other reasons set forth. (See Petition, appendix D, page 9a and appendix E, page 11a.) Thus, petitioners have even waived any claim that the Kentucky Statute of Limitations violates the Kentucky constitution, not to mention the Constitution of the United States of America.

## CONCLUSION

Simply said, the petition fails to disclose that a Federal question is presented to the Supreme Court for review, since no Federal question was presented at the

Trial Court level nor in either of the Appellate Courts of Kentucky. The jurisdiction of the Supreme Court of the United States thus is not properly invoked. The Petition for Writ of Certiorari should be dismissed for lack of jurisdiction.

Respectfully submitted,

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